Supreme Court, U.S.
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No. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

TERRENCE D. MORGAN,
Petitioner,

vs.

SECRETARY OF DEFENSE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Circuit Court of Appeals err as a matter of law in affirming the United States District Court's decision in denying Petitioner's Petition for Attorney's Fees under the Equal Access to Justice Act in that it failed to focus on unconstitutional conduct clearly demonstrated and determined as a matter of fact and found as a matter of fact by the District Court?

2. Did the Third Circuit Court of Appeals err as a matter of law wherein it concluded that the Commanding General's decision was "substantially justified" even though it was based on an erroneous rendition of the historical facts?

3. Did the Third Circuit Court of Appeals err as a matter of law in that it shifted the burden of proof to Petitioner Morgan to disprove that the Government's position was substantially justified?

4. Did the Third Circuit Court of Appeals err in concluding that the Government's litigation position was substantially justified when the Government's litigation attorney knew or had reason to know that the military prosecutor had engaged in deceptive and illegal fabrication of evidence against the Petitioner during the course of the military's investigation into recruiter fraud?

TABLE OF CONTENTS

Page

Table of Authorities iv

Official And Unofficial Reports Of Opinions Delivered In the Case By Other Courts 1

Jurisdiction 2

Constitutional and Statutory Provisions At Issue 2

Concise Statement Of The Case 3

Reasons Why The Writ Should Be Granted 5

A. The Court of Appeals' decision was erroneous as a matter of law in that it failed to focus on the unconstitutional conduct 8

B. The Court of Appeals' decision was erroneous as a matter of law wherein it concluded that General Lynch's decision was "substantially justified" even though it was based on an erroneous rendition of the historical facts 13

C. The Court of Appeals' decision was erroneous, as a matter of law, in that it shifted the burden of proof to Petitioner Morgan to disprove that the Government's position was substantially justified 15

Page

D. The Court of Appeals erred in concluding the government's litigation position was substantially justified when government attorneys knew or had reason to know that Captain Koleos had engaged in deceptive and illegal fabrication of evidence against Sergeant Morgan during the course of the military's investigation into recruiter fraud 19

E. This Petition Should be Granted to Correct a Conflict In the Circuits 21

Conclusion 22

TABLE OF AUTHORITIES

Cases — Page

Ardestani v. INS, 502 U.S. 129,
112 S.Ct. 515 (1991) 7

Citizens Council of Delaware
County v. Brinegar, 741 F.2d 584 (1984) 14

Brinker v. Guiffrida, 798 F.2d 661
(3d Cir. 1986) 9, 11, 14

Commissioner INS v. Jean, 496 U.S. 154,
110 S.Ct. 2316 (1990) 6, 21

Estate of Merchant v. Commissioner,
947 F.2d 1390 (9th Cir. 1991) 22

In re Lamson, 1995 U.S. App. LEXIS 2566
(4th Cir. 1995) 22

Lundin v. Mecham, 980 F.2d 1450
(D.C. Cir. 1992) 5

Morgan v. Perry, 142 F.3d 670
(3d Cir. 1998) 1, 12

Morgan v. Perry, Civil Action No. 91-1064
United States District Court for the
Western District of Pennsylvania
May 3, 1996. (App. D) 1

Page

Morgan v. Perry, Civil Action No. 91-1064, United States District Court for the Western District of Pennsylvania, August 24, 1995. (App. E) 1

Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 703 F.2d 700 (3d Cir. 1983) 9

Sampson v. Chater, 103 F.3d 918 (9th Cir. 1996) 22

Sullivan v. Finkelstein, 496 U.S. 617, 110 S.Ct. 2658 (1990) 6

United States v. 341.45 Acres of Land, St. Louis Cty., Minn., 751 F.2d 924 (8th Cir. 1984) 22

United States v. Charles Gyurman Land & Cattle Co., 836 F.2d 480 (10th Cir. 1987) 22

Washington v. Heckler, 756 F.2d 959 (3d Cir. 1981) 15

Other Authorities

5 U.S.C. § 504 6

28 U.S.C. § 1254(1) 2

Equal Access To Justice Act, 28 U.S.C. § 2412 . . . 2, 8

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Morgan v. Perry, 142 F.3d 670 (3d Cir. 1998).

Morgan v. Perry, Civil Action No. 91-1064 United States District Court for the Western District of Pennsylvania May 3, 1996. (App. D).

Morgan v. Perry, Civil Action No. 91-1064, United States District Court for the Western District of Pennsylvania, August 24, 1995. (App. E).

JURISDICTION

This writ relates to the entry of Judgment of an Order of the United States District Court for the Western District of Pennsylvania dated May 3, 1996, at Civil Action No. 91-1064 which denied Plaintiff's Motion for Attorney's Fees and Costs under EAJA, which was affirmed by the United States Court of Appeals for the Third Circuit by Order entered April 27, 1998 at No. 96-3314.

By Order dated June 23, 1998, the Third Circuit Court of Appeals denied Petitioner's Petition for Rehearing En Banc, with Chief Judge Becker voting for Rehearing.

The Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The third issue raised in this Petition for Writ of Certiorari invokes the due process protection provided by the Fifth Amendment of the United States Constitution which reads in relevant part as follows:

> No person shall ... be deprived of life, liberty or property, without due process of law[.]

Each issue raised herein relates to the Court of Appeals' decision to deny Petitioner's request for fees pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412.

CONCISE STATEMENT OF THE CASE

Master Sergeant Terrence Morgan was a career Marine with a distinguished record. In 1986, he served as the Recruiting Instructor and one of the top non-commissioned officers at Recruiting Station (RS) Pittsburgh. (E 2-7, ¶ 2, 3, 7). RS Pittsburgh had been ranked first in the nation in productivity of Marine recruits. (E 3-5, ¶s 4, 5). In order to preserve its vaunted position against competition from other recruiting stations, members of RS Pittsburgh behaved unscrupulously including by enlisting young people with false diplomas, criminal records, medical problems, and inadequate documentation. (E 7-14, ¶s 10, 11, 12, 13, 14, 15, 16). Sergeant Morgan brought evidence of irregularities to the attention of his commanding officer and was rebuffed. (Id.) Then he took the evidence to his District Command in Philadelphia. (Id.)

During the following investigation by the District Command, Sergeant Morgan became a target. (E 16-17, ¶ 19). Captain Daniel J. Koleos, a military prosecutor was the counsel to the investigation. (E 15, ¶ 18, n.17). Sergeant Morgan was subjected to outrageous tactics during the initial and subsequent investigations including a rigged physical identification, the coerced and later recanted testimony of his colleagues, and a fabricated accusation of a civilian print shop that Sergeant Morgan had created false diplomas, which also was contrived, by Captain Koleos. (E 16-17, 30-38, ¶s 19, 31, 32, 33, 34, 35, 36, 37). These and other shameful acts were brought to the attention of Jarvis D. Lynch, the Commanding General of Paris Island by credible sources including the Naval Investigati n Service (NIS). (E 23-25, 40-42, ¶ 25, 26, 27, 39). Later, in the summer of 1989, Sergeant

Morgan was scheduled to face court martial. (E 45-46, ¶ 42). Again Captain Koleos was the prosecutor. The key to Koleos' case was a purported "gray book" allegedly belonging to Sergeant Morgan containing illegal gambling information. (Id). The prosecutor's representation that he possessed this evidence induced Sergeant Morgan to forego his right to a court martial and resign in disgrace with an Other Than Honorable (OTH) discharge. (E 47-48, ¶ 44).

The following day it became apparent that Captain Koleos had lied during plea negotiations. (Id.) The prosecution actually did not have a gray book. Sergeant Morgan, through his military counsel, immediately sought to revoke the OTH discharge. (E 50, ¶ 46). Even Captain Koleos agreed that the Marine should have his court martial. But General Lynch, again willfully blinding himself or ignoring the evidence, nevertheless refused to allow the court martial. (E 51-52, ¶ 47).

Sergeant Morgan filed suit in federal court in 1991. Four years of difficult pretrial litigation and discovery led to an arduous six-week injunctive trial at which he prevailed and proved that the prosecutor had violated the due process guarantees of the Fifth Amendment. Afterwards his counsel applied for attorneys fees under EAJA to compensate it for prevailing in this extraordinarily complex litigation. The District Court denied the request for fees totally, and the United States Court of Appeals affirmed. In the following discussion, Petitioner Morgan will show various ways in which the Court of Appeals' decision was erroneous. Petitioner raised each of the issues raised herein in his Petition for Rehearing En Banc.

REASONS WHY THE WRIT SHOULD BE GRANTED

The trial court's stunningly severe decision on fees violates the purpose of the Equal Access of Justice Act. The legislative history of EAJA makes it evident that the statute was intended as a shield for the individual to use against the overwhelming resources of the federal government. Lundin v. Mecham, 980 F.2d 1450, 1457 (D.C. Cir. 1992) (quoting comments of legislators when enacting EAJA).

The comments of legislators on their passage of EAJA reflect the concerns of the founders. The American system of federalism must above all, check the growth of tyranny of the government over a particular individual:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federalist Number 51, James Madison.

This classic defense of the separation of powers and the republican process is echoed in the concerns of Congress as it secured to the individual access to the judicial branch for the purpose of obliging the government to control itself.

Congress began the EAJA with a statement of its findings, and noted, as a basis for the legislation, that

individuals might be deterred from seeking review of unreasonable government action because of the expense involved.

Congress not only highlighted the relative positions of power in the case of an individual forced to litigate against the United States, but went on specifically to articulate the object of the EAJA:

> To diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorneys fees, expert witness fees, and other costs against the United States; and (2) to ensure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American Rule" respecting the award of attorneys fees.

Congressional Findings and Purposes, Note following 5 U.S.C. § 504 [footnote omitted]; see also, Commissioner INS v. Jean, 496 U.S. 154, 165, 110 S.Ct. 2316, 2322 (1990).

"The purpose of EAJA was to counterbalance the financial disincentives to vindicating rights against the government through litigation." Sullivan v. Finkelstein, 496 U.S. 617, 630, 110 S.Ct. 2658 (1990). The fee-shifting facet of EAJA was intended to encourage private attorneys general to challenge governmental abuses, a vitally important concern.

When an individual's rights are violated, even though that situation is unique to the person, he should not be made to choose between buckling to an unreasonable

government action or prevailing against it to his financial ruin. The Supreme Court holds this view of EAJA: "Fee awards were intended to address this problem: 'when there is an opportunity to recover costs,' the committee noted, 'a party does not have to choose between acquiescing to an unreasonable government order or prevailing to his financial detriment.'" Ardestani v. INS, 502 U.S. 129, 142, 112 S.Ct. 515, 523 (1991) (citation omitted).

In particular, the Court of Appeals' denial of attorney's fees and costs to Petitioner under EAJA constitutes a chilling effect to aggrieved citizens who believe they have been subjected to abusive and harassing executive branch practices. As Senator DeConcini explained:

> Through the device of fee-shifting, the bill attempts to overcome the financial obstacles which prevent citizens from challenging the unreasonable exercise of Government authority.... It is also intended to affirmatively encourage citizens to challenge actions which they believe to be unreasonable or irresponsible. It recognizes that those who choose to litigate an issue against the Government are not only representing their own vested interest, they are also refining public policy, correcting errors on the part of the Government, and helping to define the limits of Federal authority. In short, people are serving public policy and a public purpose.

703 F.2d at 709.

It is clear from the record that the Marine Corps could not, or would not, address the career-shattering rights violation at hand. The aggrieved individual engaged a law

firm which expended over 2000 hours and prevailed. Such an effort not only would be ruinous, but would not be likely to be duplicated in other situations of big government abuse, unless the purpose of EAJA is realized and fees are allotted.

A. The Court of Appeals' decision was erroneous as a matter of law in that it failed to focus on the unconstitutional conduct.[1]

The Court of Appeals committed an error of law in its EAJA analysis of whether the government's position at the administrative level was "substantially justified."

> When, after prevailing on his constitutional claim, Morgan filed an application for fees and costs under the Equal Access To Justice Act, 28 U.S.C. § 2412 (hereinafter referred to as "EAJA"), the trial court [and Panel] shifted its attention from an examination of the prosecutor's misconduct to General Lynch's refusal of Morgan's request to withdraw his OTH discharge. Through this shift, the constitutional dimensions of this case were lost and became secondary to actions which were several steps removed from the violations giving rise to Morgan's favorable verdict.

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[1] Refer to the Decision of the District Courts for overview of all relevant facts. (App. E).

(F 3-4). ACLU Amicus Brief at 3-4.[2] By so analyzing this case, both the District Court and the Court of Appeals misconstrued Congressional purpose and acted contrary to decisional law requiring a review of the totality of the circumstances in determining whether the Government's position was substantially justified.

By mis-analyzing this issue, the Court of Appeals reached a conclusion directly contrary to Congressional intent in passing the EAJA, and is at odds with Brinker v. Guiffrida, 798 F.2d 661 (3d Cir. 1986) (Mansmann, J.). Congressional intent in enacting EAJA is set forth at length in Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 703 F.2d 700, 704-713 (3d Cir. 1983).

Sergeant Morgan brought this action because he had been the victim of abuse and unconstitutional conduct by several members of the armed services, including the military prosecutor, Captain Koleos.

The "agency action" Sergeant Morgan challenged included Captain Koleos' proven unconstitutional conduct which induced Sergeant Morgan to submit a request for an OTH discharge. Once he discovered that Captain Koleos actively had misled him about the existence of the "gray book," Sergeant Morgan immediately requested permission to withdraw the request for OTH. The District Court held:

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[2]The Allegheny County [Pennsylvania] Bar Association also submitted an amicus brief to the United States Court of Appeals to the Third Circuit on Petitioner's behalf. (App. G).

> Based on the evidence offered by plaintiff, the court has little difficulty concluding that the conduct of the military prosecutor during the week preceding plaintiff's scheduled trial by general court-martial violated plaintiff's right to procedural due process under the Fifth Amendment. Specifically, the court finds that Captain Koleos engaged in deceptive conduct in connection with the availability of Staff Sergeant Cummings and the ability of the government to gain possession of the gray book. (footnote omitted) The court further finds that such deception was improper, and that it was the determining factor in plaintiff's decision to request an OTH discharge in lieu of trial by general court-martial, violating his right for an opportunity to be heard on the charges against him. (footnote omitted) Accordingly, plaintiff is entitled to a declaratory judgment that defendants violated his right to procedural due process of law under the Fifth Amendment.

(E 59-60, ¶ 55) (emphasis supplied). Sergeant Morgan prevailed in proving wrongful agency action prior to General Lynch's final decision, which simply compounded previous wrongful and unjustified agency action.

By accepting the government's definition of the issue and focusing narrowly on General Lynch's single discrete decision not to permit Morgan to retract the OTH request, the Court of Appeals in essence focused on the government's "straw man."

The courts below artificially separated General Lynch's conduct from that of Captain Koleos, his agent and employee. Koleos conducted the investigations and

prosecution as appointed to do so by General Lynch. General Lynch's decision was not a separate and independent act, but rather was part of a continuum of events initiated by Captain Koleos; misdeeds, including unconstitutional prosecutorial misconduct. (Id.)

In the instant federal case the Government was not the prevailing party on the merits and found itself in the delicate and awkward position of justifying unethical conduct. Yet to date, it successfully has gotten the lower courts to adopt a framework for analyzing EAJA which all but insulates bureaucratic miscreants from the consequences of fee shifting provided that they can pass the buck to a high-level manager such as a general or cabinet secretary for a cursory ratification. Petitioner urges this Court to reexamine this serious situation carefully and to see it for what it is - a seductive and artificial paradigm -- which if widely adopted will thwart the intent of Congress, make constitutional cases against federal agencies all but impossible for all plaintiffs except for well-endowed institutions and individuals, and punitively limit access to courts.

In Brinker v. Guiffrida, the Court of Appeals was faced with a similar dilemma in determining the "substantial justification" of a federal agency's litigation position. In concluding that the District Court's finding was erroneous, Judge Mansmann wrote:

> To avoid an award of attorney's fees to a prevailing party, the government must proffer a justification which is substantial with respect to its position viewed as a totality.

> In this regard, the government's burden is to show that the relationship of the facts and legal theories alleged in support of its position is such that the government is substantially justified in defending against a claim.

798 F.2d at 667 (emphasis supplied).

The Third Court herein failed to consider the "totality" of the agency action at issue. This error was compounded by the fact that Captain Koleos' unconstitutional conduct was integrally related to General Lynch's decision. The Court of Appeals specifically noted:

> Although we in no way minimize the gravity or impropriety of Koleos' conduct, it is clear to us that Koleos' conduct is not the issue before us. Rather, the issue is General Lynch's refusal to allow Morgan to withdraw his request of an OTH discharge and proceed to a general court martial. **The fact that Morgan's request was triggered by Koleos' conduct does not elevate that conduct to the level of agency action under the facts before us nor transform his conduct into the decision that was challenged in the Court. Morgan challenged General Lynch's decision, and that is the agency action that must be substantially justified if Morgan is to be denied fees under the EAJA even though Koleos' conduct formed the basis of Morgan's relief in the District Court.**

Morgan v. Perry, 142 F.3d 670, 686 (3d Cir. 1998) (emphasis added). The relief that Sergeant Morgan obtained from the District Court was based solely on its conclusion that Captain Koleos' unconstitutional conduct

had induced Sergeant Morgan to submit the OTH. It is logically inconsistent for the court on one hand to grant Petitioner relief based on Captain Koleos' unconstitutional conduct, while on the other to conclude that this conduct was not the agency action being litigated. The extensive trial record of evidence of misconduct admitted and deemed relevant by the court further reflects that it did not restrict the inquiry to General Lynch's conduct until the fee petition was filed.

B. The Court of Appeals' decision was erroneous as a matter of law wherein it concluded that General Lynch's decision was "substantially justified" even though it was based on an erroneous rendition of the historical facts.

The Court of Appeals committed further error of law wherein it concluded that General Lynch's decision was "substantially justified" even though he was wrong as a matter of fact in his conclusion that "there was no change" in the underlying facts. As the Court of Appeals stated:

> We must disagree that "nothing had changed." Morgan had learned that the Government did not have his gray book, and apparently believed that the Corps' case against him was seriously compromised without it. Furthermore, when Morgan sought to withdraw his request for the OTH discharge, Lynch knew that Koleos had been accused of misconduct and he knew that the government did not have the gray book in its possession. (142 F.3d at 687).

While blithely citing that "a position can be justified even though it is not correct," the Court of Appeals failed to

consider that:

> [T]he government's burden is to show that the relationship of the facts and legal theories alleged in support of its position is such that the government is substantially justified in defending against a claim. A threshold requirement for meeting this burden is to show that the alleged facts have a reasonable basis in truth. See Brinegar, 741 F.2d at 593.

Brinker, 798 at 667 (emphasis added).

General Lynch's conclusion that "nothing had changed" did not have a reasonable basis in truth. Rather, just the opposite was true and this was well known not only to General Lynch, but to his advisors, Colonel Jones and Captain Koleos, as well as to others. The mantra that a "position can be justified even though it is not correct," does not apply in this situation.[3]

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[3] The agency and General Lynch also failed to investigate the serious charges of unethical conduct and prosecutorial misconduct in 1989. The District Court concluded that despite assurances to Congress following Morgan's OTH, by General A.M. Gray, the Marine Commandant, that General Lynch would head an investigation into Morgan's charges of prosecutorial misconduct, no evidence was presented to show that the agency in fact conducted such an investigation. (E 52-54, ¶ 48, 49, 50). In effect, the Marines thwarted Congressional oversight which necessarily led Morgan to resort to a judicial review of the agency action. In itself this militates in favor of fee shifting. This case could have

C. The Court of Appeals' decision was erroneous, as a matter of law, in that it shifted the burden of proof to Petitioner Morgan to disprove that the Government's position was substantially justified.

It is well established that the government bears the burden of establishing that its position was substantially justified. Washington v. Heckler, 756 F.2d 959, 961 (3d Cir. 1981). To the extent that the Court concluded that a "gray book" in fact existed and the concomitant assumption that Morgan was in fact guilty of engaging in illegal gambling activities, its decision is based on a gross error of fact, constitutes palpable abuse of discretion and erroneously shifted the burden of proof to Morgan to prove that the Government's position was not substantially justified. The Court's presumption that Morgan was aware of his implicit guilt in gambling charges is not supported by the record and, in fact, is contrary to the evidence of record.

Morgan testified that by the time he was accused of illegal gambling, he thought that the "fabrication was never going to stop and I was going to end up in the brig no matter what." (H 8). By the point in time when Morgan submitted the OTH, he fully believed that the government was capable of fabricating a "gray book" to support its claims as it had fabricated evidence against him in the preceding years. (H 14-18). Morgan testified:

Q: Did you have a gray book?

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been unnecessary if the Marines had been forthcoming with Congress.

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A: No, I never had a gray book.

*****

Q: What effect did [the allegation of its existence] have on you?

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A: Well, that was, this was just the last straw, this was it. It was quite apparent that the Marine Corps was not going to stop fabricating evidence against me. It is quite apparent that a lot of the evidence has been proven it is fabricated. I was told even if I [won] a general court-martial that I would not be reenlisted and my career was over.

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This was just the last straw. If they had a gray book, either Staff Sergeant Cummings had made it or Captain Koleos had made it. That was my perception. It wasn't going to stop. It wasn't going to end. I couldn't win.

I knew that my career was over. I just, I gave up. I quit. I had a moment of weakness and I just said enough is enough, I just want it all to end.

(Id.)

Morgan's testimony supports the equally plausible inference that he was **not** guilty of illegal gambling, but firmly believed that the Marine Corps had, in fact, fabricated evidence that he had engaged in illegal gambling activities. This conclusion is supported by the following findings of fact by the District Court:

a. A recruit named Michael Lockwood was encouraged to falsely state that Plaintiff had

procured a false diploma for him. (E 16, 37-39).

b. Master Sergeant Cawman of the investigating team accused Plaintiff of having a printing press in his basement, an allegation which Plaintiff claimed was ludicrous. (Id.)

c. In his February 17, 1989 report, Col. Evans made findings of fact that Plaintiff was involved in the procurement of false diplomas for applicants Ballew, Grabowski, Brough, and Robinson. These findings were based on statements taken during that investigation. However, each of these statements was subsequently recanted. (E 22, 29). One witness stated that member of the investigating team stated he wanted to "pin" something on Morgan. (E 36).

d. During the Casey investigation, Captain Koleos falsely reported that Jerry L. Williams, a civilian who owned a print shop in Bedford, Pennsylvania, identified Morgan as an individual who had contacted him about making a false diploma. Subsequently, Mr. Williams denied ever making that statement to Captain Koleos, and in fact refused to sign the Results of Interview form presented to him by Mr. Koleos. (E 25-26, 27 n.33). At trial Captain Koleos testified that Mr. Williams' "could not identify Morgan as a Marine who had requested a false diploma." (Id.) (See, also, E 31-32).

e. Plaintiff was charged with threatening Mr. Williams with economic harm if he did not assist Morgan in making false diplomas. However, Mr. Williams

testified that it was the investigator (Koleos) who threatened him if he did not assist in their investigation. (E 32 n.38).

f. Prior to submitting his OTH, Plaintiff was also aware of a statement by staff Sergeant Cummings (who allegedly had access to the alleged "gray book"), in which he indicated that he was getting "kicked out" of the Marine Corps and that he, "was not going down alone, he was taking other people with him whether they were guilty or not." (E 36-37).

g. With respect to Staff Sergeant Cummings' motivation to falsely implicate Plaintiff, Plaintiff testified that Cummings was a chronic and habitual liar who had psychological problems, that Morgan had brought these facts to the attention of the Commanding Officer of R.S. Pittsburgh, and that Morgan had reported Cummings' illegal drug use. (E 43).

In short, the evidence in the record amply buttressed Sergeant Morgan's reason to believe that Captain Koleos had fabricated the gray book and would use it against him. In fact, Captain Koleos previously had created false evidence. Hence, Sergeant Morgan had a basis to believe that Captain Koleos would continue to contort justice by fabricating a "gray book." The belief of the trial court and the Court of Appeals that Sergeant Morgan truly had a gray book is not substantiated by evidence. It amounts to a presumption in favor of the Government, which was relieved of its legislated burden to prove this alleged fact in order to escape fee shifting.

D. The Court of Appeals erred in concluding that the government's litigation position was substantially justified when government attorneys knew or had reason to know that Captain Koleos had engaged in deceptive and illegal fabrication of evidence against Sergeant Morgan during the course of the military's investigation into recruiter fraud.

The Court of Appeals failed to consider the undisputed facts of record with regard to the insubstantiality of the government's litigation position. The government possessed but disregarded substantial reasons to know that Captain Koleos had engaged in deceptive and illegal fabrication of evidence against Sergeant Morgan during the course of the military's investigation into recruiter fraud.

Major Edward Duffy, the government's trial counsel, attended the deposition of print shop owner Jerry Williams in Cumberland, Maryland, on February 9, 1993. At the deposition which later was read into the trial, Mr. Williams made plain that he had not named Sergeant Morgan to Captain Koleos, despite Koleos' threats, prodding, and obsession with Sergeant Morgan. (I 4-9). Moreover, Williams declined to sign a statement for Captain Koleos implicating Morgan in wrongdoing. (I 8-9).

At the deposition and at trial, Major Duffy, did not and could not impeach Williams in any way (nor was Williams impeached at trial by any other witness). Major Duffy knew or should have known that Captain Koleos, despite his high quasi-judicial responsibility, had fabricated evidence against Sergeant Morgan in the form of the Results of Interview embraced in the Casey Report as

enclosure 20. (K 1).

The trial court's finding of fact at ¶ 33 reveals that the government had full knowledge, prior to trial, that Captain Koleos had attempted to induce Mr. Williams of Precision Printing, to implicate Morgan in illegal conduct despite the fact that Mr. Williams had no evidence in support thereof. Mr. Williams testified that it was Captain Koleos who kept inserting Plaintiff's name into their investigatory conversation. During the course of the investigation, Mr. Williams and his employees unequivocally stated, upon seeing Sergeant Morgan, that he was not the Marine who had come into their shop for the purpose of producing false high school diplomas for recruits.

Moreover, during the course of litigation, the Government's attorney, Albert Schollaert, discovered that Captain Koleos had deceived Sergeant Morgan and his defense counsel, Captain Puleo, during the days immediately preceding Sergeant Morgan's request for OTH and his scheduled court martial.

Captain Koleos' deposition of May 19, 1993 in Miami was attended by Mr. Schollaert, who later also represented the government at trial. In the deposition, Captain Koleos testified to his conduct regarding the gray book. In particular, he stated that he told Captain Puleo, the military defense attorney, that Cummings had the book. But, in deposition Captain Koleos admitted he also had known at the time that Cummings was wavering, sometimes telling Koleos that he (Cummings) had the book and sometimes that he did not. (J 3). In short, at that time of discovery the government knew or should have known of deceptive conduct about the status of evidence that lead to the OTH and to the District Court's finding of

a due process violation.[4] Nevertheless, the Plaintiff was forced to go through the effort and expense of a six week civil rights trial in order to gain relief.

E. This Petition Should be Granted to Correct a Conflict In the Circuits.

The Court's decision in this matter does not harmonize with the decisions of other Circuit Courts of Appeal, or with predominant indications from the Supreme Court. That is, the Panel's decision failed to consider the "totality of the circumstances" in its EAJA analysis.

The Supreme Court in Commissioner INS v. Jean, 496 U.S. 154, 165, 110 S.Ct. 2316, 2322 (1990), did not completely resolve whether to look to the case as a whole in determining whether the government's position was substantially justified. However, this Court surely discourages an issue by issue analysis of the government's posture throughout each phase of litigation:

> Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA -- like other fee shifting statutes -- favors treating a case as an inclusive whole, rather than as atomized line-items.

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[4]That Koleos had repeated telephone calls in which Cummings changed his position also cut against the military prosecutor's false testimony that Koleos could not locate Cummings.

496 U.S. at 161-63.

Many Circuits which have addressed this issue have determined that a substantial justification analysis must be based on the "totality of the circumstances" surrounding the proceedings in question. See, Estate of Merchant v. Commissioner, 947 F.2d 1390, 1393 (9th Cir. 1991); Sampson v. Chater, 103 F.3d 918 (9th Cir. 1996); United States v. 341.45 Acres of Land, St. Louis Cty., Minn., 751 F.2d 924, 940-41 (8th Cir. 1984) ("We must consider the totality of the circumstances -- prelitigation and during litigation -- in determining whether the position of the government was substantially justified." Id. at 940.); In re Lamson, 1995 U.S. App. LEXIS 2566 (4th Cir. 1995); and United States v. Charles Gyurman Land & Cattle Co., 836 F.2d 480 (10th Cir. 1987).

The Court of Appeals' decision here, as with the District Court's decision below, focused solely on a single decision of one individual who was largely uninvolved in the sweep of events that led to the termination of Morgan's illustrious career in the United State Marine Corps. Such a narrow focus clearly is not a "totality of the circumstances" analysis and thus places this decision at odds with the analysis of EAJA by other circuits.

CONCLUSION

The Court of Appeals' affirmance of the District Court's denial of fees to Petitioner under the Equal Access to Justice Act constitutes a gross error of federal law which, if left uncontradicted, will have a chilling effect on potential plaintiffs and the bar in direct contravention of the Congressional purpose in enacting EAJA.

The lower courts' focus on the single decision of Colonel Lynch, rather than deciding this case on the totality of the circumstance, and particularly on the basis of the unconstitutional conduct of the military prosecutor, Captain Koleos, conflicts with the method of analysis applied not only in other Circuit Courts of Appeal, but with earlier decisional law of the Third Circuit.

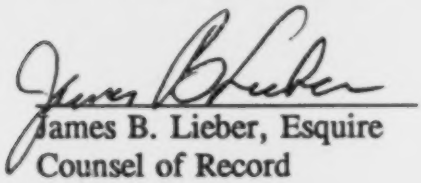
The appropriate scope of analysis to be applied in EAJA cases has not been clearly stated by this Court. The instant petition provides this Court with an opportunity to answer such questions and to provide guidance in future cases.

Finally, Petitioner seeks a remedy to the lower courts' fundamental error wherein it focused on the singular decision of Colonel Lynch to deny retraction of the OTH, rather than on the unconstitutional conduct of military prosecutor Koleos, upon which all of Petitioner Morgan's relief was granted. As previously stated, the lower courts' focus on General Lynch's decision was, in essence, the creation of a governmental "straw man" to take responsibility for all of the preceding unconstitutional conduct. Such analysis insulated the government from being made to accept responsibility for its conduct, and placed the full financial burden of successfully litigating this action on Petitioner Morgan.

If not reversed, the decision of the Third Circuit will water the EAJA and hinder access to courts even for plaintiffs with meritorious constitutional claims.

Respectfully submitted,

LIEBER & HAMMER, P.C.



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